(24)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 397

THE NEW YORK GREAT ATLANTIC & PACIFIC TEA COMPANY, ET AL.,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

CARUTHERS EWING,
GEORGE S. WRIGHT,
JOHN N. TOUCHSTONE,
Counsel for Petitioners.

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vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Petitioners, who are all of the defendants in the indictment except Business Organization, Inc., and Carl Byoir, show to this honorable court:

A.

Summary Statement of the Matter Involved.

An indictment was returned by the Grand Jury of the Northern District of Texas for a violation of the Sherman Act.

Count One of the indictment purports to charge thirteen corporate and seventeen individual defendants with a combination and conspiracy in restraint of trade in food prod-

ucts. The first twelve corporations are described as the A & P Group, eight of the individual defendants as headquarters defendants and as officers, directors, agents and employes of the A & P Group, and the other eight individual defendants as officers, agents and employes of the A & P Group. The thirteenth corporation, Business Organization, Inc., and the seventeenth individual defendant, Carl Byoir, chairman of the board of that company, are described as public relations counsel for the A & P Group. (Tr. 7-37)

Count Two of the indictment repeats the allegations of Count One and purports to charge a combination and conspiracy to monopolize such trade. (Tr. 37-46)

The corporations of the A & P Group and their officers and employes are not in competition with each other. The New York Great Atlantic & Pacific Tea Company owns all of the authorized and outstanding stock of The Great Atlantic & Pacific Tea Company of America. The Great Atlantic & Pacific Tea Company of America owns all of such stock of the other A & P corporations except the stock of Great Atlantic & Pacific Tea Company of Vermont, which is owned by the Great Atlantic & Pacific Tea Company of New Jersey. Defendants George L. Hartford and John A. Hartford, as trustees of the George H. Hartford Trust, own all of the authorized and issued stock of the New York Great Atlantic & Pacific Tea Company. (Tr. 7-18)

Thus the indictment shows that the petitioners are affiliated and non-competing units, engaged in a single enterprise, and that they are in effect a single trader.

None of the corporate defendants is a Texas corporation, each has its general offices in New York City; the residences of all of the seventeen individual defendants except one are far removed from Texas. The one Texan indicted is superintendent of the Dallas unit. (Tr. 11) The headquarters defendants, who are the general officers of the corporations of the A & P Group, are charged with dominating the other

officers, agents and employes of the A & P Group. (Tr. 28)

The indictment covers forty-seven pages of the transcript. (Tr. 1-47) For the convenience of the court in considering this petition and the accompanying brief, we have attached hereto as Appendix A, a summary of the indictment.

Petitioners filed a demurrer to the indictment, raising the following points:

(1) No allegation of fact showing jurisdiction;

(2) No allegation of fact showing trade and commerce involved is interstate;

(3) No allegation of fact showing a violation of the Sherman Act;

(4) Averments of each count mere conclusions not binding upon defendants;

(5) There is such vagueness and indefiniteness in the statement of alleged acts that defendants are not so informed of the charge as to enable them to prepare their defense or to plead former jeopardy;

(6) The indictment is duplicitous. (Tr. 48-50)

A demurrer with the same points and with the additional question that there was no allegation of fact connecting Business Organization, Inc., with the alleged wrong was filed by that organization. (Tr. 73-75)

On February 13, 1943, the trial court in his oral opinion stated that the indictment contained many inflammatory, prejudicial and irrelevant allegations, that it was vague, that it did not show jurisdiction, and that all demurrers should be sustained. (Tr. 76-91)

On February 15, 1943, the court entered an order sustaining all the demurrers. (Tr. 92)

The Government appealed to the Fifth Circuit Court of Appeals, and on July 30, 1943, the majority of that court,

through Justice Hutcheson, affirmed the judgment of the trial court sustaining the demurrer of Business Organization, Inc., and reversed and remanded the judgment of the trial court sustaining the demurrers of the other defendants. (Tr. 111-119).

Petition for rehearing was timely filed and was denied September 1, 1943. (Tr. 149).

In the decision of the majority it was held in substance:

(1) That there were many allegations in the indictment which are irrelevant and unnecessary to the charging of the offense and which, if not designed to be, are in fact inflammatory and prejudicial, and that the defendants are entitled to relief against them; that the relief is not the sustaining of a demurrer, but action by the trial court in preventing such allegations or evidence in support thereof from going to the jury. (Tr. 114)

(2) That in a criminal case such as this, where the principal question involved is whether or not a contract was made or a conspiracy entered into, the allegation of an indictment or the testimony of a witness that a contract was made or a conspiracy entered into at a certain time and place is an allegation of fact and not a conclusion. (Tr. 116)

(3) That the allegation in paragraph 22 of the indictment that the conspiracy was formed and the allegation in paragraph 26 that it has been entered into in part in the Northern District of Texas are not conclusions, but allegations of fact. (Tr. 117)

(4) That the allegation in paragraph 22 that the conspiracy was carried out in part in the Dallas Division and the allegation in paragraph 26 that the combination and conspiracy was carried out in part in said district by performance of many of the acts in paragraph 23 were not mere conclusions, but allegations of fact; that the allega-

tion in paragraph 26 that defendants advertised food and food products, particularly meat, below cost and below the price charged in other locations for the purpose and with the intent of destroying competition of independent concerns, meat dealers and local chain stores, shows jurisdiction in the trial court. (Tr. 117)

(5) That the allegations in the indictment sufficiently advised the defendants of the charge against them. (Tr. 115)

(6) That the indictment was not duplicitous because of the interrelation and ramifying activities of associated and affiliated companies of the A & P Group and their dominance and control by their officers, which make the conspiracy charged not several, but one. (Tr. 115-116)

Circuit Justice Waller filed a dissenting opinion, holding in substance:

(1) That if the facts alleged in the indictment failed to show jurisdiction, the other questions were immaterial. (Tr. 119)

(2) That as the federal court is a court of limited jurisdiction, it is necessary that the indictment allege facts from which it will affirmatively appear that the district court has jurisdiction. The constitutional guaranty that the defendants shall be tried in the district where the offense is committed shall not be lightly regarded. It is often difficult and expensive to obtain witnesses to testify at a point far removed from the scene of the offense. In the present case the dominant officers and officials of defendants reside in New York, only one defendant of a minor capacity residing in Texas, and the court should inquire, "Why is the venue sought to be fixed at Dallas, so far removed from the headquarters of the corporate defendants and the dominant corporate officials?" (Tr. 123)

(3) That the allegation that the combination and conspiracy has been entered into and carried out in part in the Northern District of Texas is a legal conclusion, and, as it is not predicated upon allegations of fact, is without effect. (Tr. 125)

(4) That the allegation that the defendants have performed in the Northern District of Texas many of the acts set forth in paragraph 23 is wholly insufficient, because paragraph 23 alleges twenty-five or thirty acts, some of which have no relation whatsoever to interstate commerce, and if such allegation purports to be one of fact, it is so vague, indefinite and uncertain that the defendants would not know how to prepare their defense or plead former jeopardy, and should not be put to the burden of preparing to disprove all of them. (Tr. 125)

(5) That the allegation that the defendants have advertised food and food products, particularly meat, below cost and the price charged in other locations, for the purpose and with the intent of injuring and destroying competition of independent concerns, meat dealers and local chains, stripped of its too vaguely asserted facts and legal conclusions, merely alleges that defendants advertised food products in Dallas below cost. The indictment does not allege that the advertisement was fruitful, and the court cannot say so. The indictment does not allege that defendants advertised food for the purpose of injuriously affecting interstate trade and commerce, unless general assertions or legal conclusions are to be given precedence over factual particularizations. It alleges it was done for the purpose of injuring competition of independent concerns, meat dealers and local chains, which was intrastate business, and it does not allege that such advertising of food either suppressed competition in the interstate market or monopolized the supply or controlled the prices, or that it was intended

so to do, or that it was in furtherance of the conspiracy. (Tr. 126-127)

(6) And that under the decision of this court in *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, no fact was alleged showing jurisdiction in the trial court. (Tr. 119-130)

B.

Reasons Relied Upon for Allowance of Writ.

1. On at least five different occasions the Government has by direct appeal to this honorable court sought a review of trial court decisions sustaining demurrers to allegations of indictments such as are involved here, and four times this court has refused to consider such questions because the Government had no right of direct appeal: *U. S.* v. *Colgate* (Va.), 253 F. 522, 250 U. S. 300; *U. S.* v. *Borden* (Ill.), 28 F. Supp. 177, 308 U. S. 188; *U. S.* v. *Wayne Pump Co.* (Ill.), 44 F. Supp. 949, 317 U. S. 200; *U. S.* v. *Swift* (Col.), 46 F. Supp. 848, 317 U. S. (4) i, 87 L. Ed. 647.

In the fifth case, *U. S.* v. *French Bauer* (Ohio), 48 F. Supp. 260, the Government dismissed the direct appeal to this court. (Memo. Dec. 514, 318 U. S. 795, 87 L. Ed. 464.)

U. S. v. *Swift, supra,* was transferred by this court to the Tenth Circuit, and the Government dismissed the appeal on May 19, 1943. (Memo. Dec. No. 2729, 135 F. (2), No. 5, Adv. Sheet, 745.) In this case four members of this court urged a decision on the questions involved here even under a direct appeal. This is an opportunity for the court to pass on these questions by a proper appeal.

In *U. S.* v. *Safeway Stores* (Kan.) and *U. S.* v. *Kroeger Grocery & Baking Co.* (Kan.) each of the indictments contained the very language involved here, and on August 20, 1943, Judge Hopkins of the First District of Kansas, in a written opinion not yet reported, sustained practically the same demurrers as filed in this case, and appeals have been

taken to the Tenth Circuit Court of Appeals by the Government.

Such confusion results from these decisions and the decision of the Circuit Court of Appeals in this case, that these petitioners may be tried upon this indictment in Texas, but Safeway, Kroeger, Colgate, Borden, Swift, Wayne Pump Company, French Bauer and others cannot be tried on the same indictment in Virginia, Illinois, Colorado, Ohio and Kansas. This honorable court should grant writ of certiorari because it is to the interest of the public, the Government, and the courts that these important questions be finally determined, so that uniform treatment be given citizens under indictments of this nature.

2. The holding of the Circuit Court that the allegations, such as in paragraph 22 of the indictment that the conspiracy was in part formed in Dallas and in paragraph 26 that it has been entered into in part in Dallas, are allegations of fact showing jurisdiction and not mere conclusions, is in conflict with the decisions of other circuit courts and in conflict with applicable decisions of this court, such as *Missouri Pacific Ry. Co.* v. *Norwood,* 283 U S. 257; *Southern Ry. Co.* v. *King,* 217 U. S. 528; *Pierce Oil Co.* v. *City of Hope,* 248 U. S. 497; *Witherell & Dobbins* v. *United Shoe Machinery Co.* (C. C. A. 1st) 267 F. 950; *Lipson* v. *Socony-Vacuum Corp.* (C. C. A., 1st), 76 F. (2) 213.

3. The holding of the Circuit Court that the allegations that the conspiracy was carried out in part in the Dallas District and that the conspiracy was carried out in part in said district by performance of many of the acts in paragraph 23, particularly the advertising below cost and below prices charged in other locations, for the purpose of injuring and destroying competition of independent concerns, meat dealers and local chain stores sufficiently charges performance of acts in furtherance of the conspiracy within the jurisdiction of the trial court so as to give venue to that

court, is in conflict with decisions of other circuit courts and with applicable decisions of this court. *U. S.* v. *Socony-Vacuum Corp.*, 310 U. S. 150; *Martin* v. *U. S.* (C. C. A., 8th), 169 F. 198; *U. S.* v. *Post*, 113 F. 852; *White* v. *U. S.*, 67 F. (2) 71; *Skelly* v. *U. S.* (C. C. A., 10th), 37 F. (2) 503.

4. The holding of the Circuit Court that the indictment, which did not allege any facts showing that the conspiracy charged affected prices and competition in the interstate market, was sufficient against a demurrer, is in conflict with the decisions of other circuit courts and with applicable decisions of this court, such as *Apex Hosiery Co.* v. *Leader*, *supra; Industrial Assn. of San Francisco* v. *U. S.*, 268 U. S. 64; *Ewing-Von Allman Dairy Co.* v. *C. & C. Ice Cream Co.* (C. C. A., 6th), 109 F. (2) 898, certiorari denied, 312 U. S. 689; *Martin* v. *U. S.* (C. C. A., 8th), 169 F. 198.

5. The holding of the Circuit Court that the indictment alleges facts rather than conclusions sufficient to inform defendants of the charges against them so that they may prepare their defense or plead former jeopardy, is in conflict with the decisions of other circuit courts and with applicable decisions of this Court, such as *U. S.* v. *Cruikshank*, 92 U. S. 542, 568; *U. S.* v. *Hess*, 124 U. S. 483; *Evans* v. *U. S.*, 153 U. S. 584; *U. S.* v. *Colgate*, 253 F. 522, 528; *Fontana* v. *U. S.* (C. C. A., 8th), 262 F. 283; *Skelly* v. *U. S.* (C. C. A., 10th), 37 F. (2) 503; *Asgill* v. *U. S.* (C. C. A., 4th), 60 F. (2) 780, 784.

6. The holding of the Circuit Court that the indictment charging a conspiracy between members of the A & P Group to fix prices at retail of that group's own products, and a conspiracy between members of that group and independent grocers, and a conspiracy between members of that group and manufacturers, and a conspiracy between members of that group and other national food chains, and a conspiracy between members of that group and suppliers for

other purposes, is not duplicitous, is in conflict with decisions of other circuit courts and presents a question of Federal law which has not been but should be settled by this Court. *U. S.* v. *Winslow*, 195 F. 578, 580, aff'd 227 U. S. 202; *Rice* v. *Standard Oil Co.*, 134 F. 464.

WHEREFORE, petitioners respectfully pray that writ of certiorari be issued out of and under seal of this honorable court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named, full and complete transcript of the record of all proceedings in the case of No. 10603, United States of America, Appellant, v. The New York Great Atlantic & Pacific Tea Company, et al., Appellees, and that the decree or judgment of said Circuit Court of Appeals may be reversed by this honorable court, and that your petitioners may have such other and further relief as to this honorable court may seem just.

THE NEW YORK GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
THE GREAT ATLANTIC & PACIFIC TEA COMPANY OF AMERICA,
THE GREAT ATLANTIC & PACIFIC TEA COMPANY, NEW JERSEY,
THE GREAT ATLANTIC & PACIFIC TEA COMPANY, ARIZONA,
THE GREAT ATLANTIC & PACIFIC TEA COMPANY, NEVADA,
THE GREAT ATLANTIC & PACIFIC TEA COMPANY OF VERMONT, INC.,
THE GREAT ATLANTIC & PACIFIC TEA CORPORATION, DELAWARE,
THE QUAKER MAID COMPANY, INC.,

THE AMERICAN COFFEE CORPORATION,
WHITE HOUSE MILK COMPANY, INC.,
NAKAT PACKING CORPORATION,
ATLANTIC COMMISSION COMPANY, INC.,
GEORGE HARTFORD,
JOHN A. HARTFORD,
R. W. BURGER,
ROBERT B. SMITH,
DAVID T. BOFINGER,
A. G. ERNST,
FRANCIS M. KURTZ,
H. A. BAUM,
O. C. ADAMS,
W. F. LEACH,
W. M. BYRNES,
J. J. BYRNES,
R. M. SMITH,
O. I. BLACK,
T. A. CONNORS, and
A. W. VOGT,

By CARUTHERS EWING,
New York, N. Y.;
GEORGE S. WRIGHT,
Dallas, Texas;
JOHN N. TOUCHSTONE,
Dallas, Texas,
Attorneys for Petitioners.

THOMPSON, KNIGHT, HARRIS, WRIGHT & WEISBERG,
Dallas, Texas;
TOUCHSTONE, WIGHT, GORMLEY & TOUCHSTONE,
Dallas, Texas,
Of Counsel.

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